SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1034 96

R. G. TRIPPETT and A. H. MEADOWS,
Petitioners,

versus

POLARIS IRON COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

W. H. SANFORD,
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Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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LIST OF AUTHORITIES.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, R. G. Trippett and A. H. Meadows, respectfully show to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The assets of Texota Corporation, a Texas Corporation, consisted of a producing oil and gas lease in the East Texas oil field, together with cash in the corporation's treasury.

Prior to the adoption of the Rules of Civil Procedure for the District Courts of the United States, 28 U. S. C. A. following Section 723c, Polaris Iron Company, a Minnesota corporation and a former shareholder in Texota Corporation, instituted this action in equity in the United States District Court for the Western District of Louisiana, against petitioners, Louisiana citizens and shareholders in Texota Corporation, for an accounting for the difference in price paid plaintiff for its share of stock in Texota Corporation by petitioners and the amount later received by them from the sale of the corporation's lease to the Rancho Oil Company.

Polaris Iron Company having brought the suit for itself and such other former stockholders of Texota Corporation as desired to join in the action, a joint petition of intervention, seeking the same relief, was filed by H. R. Elliott and Rollo N. Chaffee, Minnesota citizens, Mr. and Mrs. G. E. Grininger, Oklahoma citizens, and Mrs. Margaret Christensen, an Illinois citizen, all former stockholders in the Texota Corporation.

For convenience, as in the courts below, Polaris Iron Company and interveners may be referred to as the Minnesota group.

Although there was no trust or confidence reposed by this Minnesota group in petitioners, whose claim to have been the elected officers and directors of the Texota Corporation by vote of the majority of the corporation's Class B stock (the holders of which stock had the right to

elect two of the corporation's three directors) had been denied continually, openly and by litigation in the lower and appellate courts of the State of Texas until the bringing of this action (R. 130, 160-163), there was a finding of fraud against petitioners based upon the breach of the alleged fiduciary relation between corporate directors and stockholders, and the accounting sought by Polaris Iron Company and interveners was granted.

However, the decree on the accounting as rendered by the District Court and affirmed by the Circuit Court of Appeals gave no consideration to the fact that the money judgment recovered by respondents against petitioners included income and excess profits taxes in the amount of $27,997.57 claimed to be due by the Commissioner of Internal Revenue of the United States from Texota Corporation and from petitioners as its transferees and sole stockholders at the date of its dissolution by reason of the sale of the corporation's oil and gas lease to Rancho Oil Company, which matter now is pending and undetermined before the United States Board of Tax Appeals.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

If the judgment is permitted to stand, petitioners, in addition to the money judgment rendered against them on the basis of $43.44 for each share of Texota stock acquired from respondents, may be compelled to pay an additional amount of $40 for each share so purchased by them in settlement of the income and excess profits tax

assessment sought to be imposed upon them as transferees of Texota Corporation.

In affirming the judgment on the accounting which was rendered without ascertaining what amount petitioners finally may be required to pay on the assessed tax claim against them, the Circuit Court of Appeals has decided in an untenable way an important question of general law, and has so far sanctioned the departure from the accepted and usual course of judicial proceedings by the District Court as to call for the exercise of this Court's power of supervision, particularly as the Circuit Court of Appeals has affirmed the District Court's judgment without even so much as alluding or mentioning in its written opinion the contention and claim of your petitioners, duly presented and renewed on appeal, in respect to the income and excess profit tax assessment.

WHEREFORE (and for the reasons set out in the brief in support hereof), your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court, for its review and determination, a full and complete transcript of the record, and other proceedings of said court, had in the case numbered and entitled on its docket, No. 9305, R. G. Trippett and A. H. Meadows, appellants, v. Polaris Iron Company, et al., appellees, to the end that this cause may be

reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and for such further relief as to this Court may deem proper.

R. G. TRIPPETT and A. H. MEADOWS,
By W. H. SANFORD,
C. HUFFMAN LEWIS,
EDWARD S. KLEIN,
Counsel for Petitioners.

Wilkinson, Lewis, Wilkinson & Naff,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 62) is reported in 28 F. Supp. 90, and the opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 175), sought to be reviewed, is reported in 110 F. (2d) 362.

II.

JURISDICTION.

The opinion of the Circuit Court of Appeals was rendered on March 15, 1940 (R. 175), and petitioners, within due time, on April 2, 1940, filed their petition for rehearing (R. 180), which was denied on April 24, 1940 (R. 187).

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347).

III.

STATEMENT OF THE CASE.

In addition to the facts stated in the petition (pp. 1-3), which are hereby adopted and made part of this brief, the following additional material facts will be stated.

In their supplemental and amended answer to plaintiffs' petition, your petitioners directed attention to the income tax and excess profits tax assessment sought to be imposed upon them by the United States Commissioner of

Internal Revenue (R. 36), likewise in their accounting (R. 75), in their answer to plaintiffs' and interveners' motion to strike the accounting (R. 84), by the introduction of the proceedings before the United States Board of Tax Appeals, (R. 96 to 110) in the statement of points on which they intended to rely in the Circuit Court of Appeals (R. 118), and in their petition for rehearing in that court (R. 180).

Petitioners, after purchasing the stock of plaintiff and interveners, distributed the property of the Texota Corporation to themselves as sole stockholders, and made the sale to Rancho Oil Company as individuals (R. 39), and therefore the amount received from the sale was not treated as having been received by the corporation for income tax purposes. But the United States Commissioner of Internal Revenue has held that such liquidation was ineffective to avoid the income tax which would have been payable had the sale been made directly by the corporation and that for income tax purposes the sale must be treated as having been made by the corporation in spite of the liquidation procedure; and the Commissioner of Internal Revenue assessed a deficiency in income tax against Texota Corporation and petitioners, its transferees, in the amount of $27,997.57 (R. 77, 103).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in failing to consider the income and excess profits taxes claimed to be due by the United States Commissioner of Internal Revenue from Texota Corporation and petitioners as its

transferees and sole stockholders at the time of its dissolution in determining the true value of the shares acquired by petitioners from respondents.

2. The Circuit Court of Appeals erred in rendering a final money judgment against petitioners in an action in equity for an accounting prior to the final determination of the income and excess profits tax claim against them now pending before the United States Board of Tax Appeals.

3. The Circuit Court of Appeals erred in affirming the District Court judgment without passing upon, or even alluding or commenting upon the contention of petitioners as regards the income and excess profits tax claim against them.

V.

ARGUMENT.

The amount for which the money judgment was rendered on the accounting against petitioners was arrived at by dividing the total consideration received from the sale to the Rancho Oil Company plus the total amount in the treasury of the corporation, by the number of outstanding shares, and multiplying the amount per share so arrived at by the number of shares held by Polaris Iron Company and interveners. No consideration whatever was given to the income taxes and excess profits taxes necessary to be paid by the Texota Corporation in the event of a sale by it of its property, and no consideration was given to the fact that the value of the Texota property to it, based upon its sale value, was not the total amount

which could be obtained for it in the event of sale, but the net amount remaining after the deduction of income taxes and excess profit taxes, which income taxes and excess profits taxes, based upon the amount which the Rancho Oil Company was willing to pay and did pay for the property, amounted to $27,997.57, or $40 per share of stock (R. 103).

Thus, instead of the value of the stock, based upon the sale value of the oil and gas lease, being $43.44 more than was paid by petitioners, same was worth under the undisputed evidence only $3.44 per share more; in other words, of the amount of $43.44 per share for which judgment was rendered against petitioners, based upon the supposed value of the stock at the time of purchase, $40 of said amount was excessive, due to failure to give consideration to income and excess profits taxes.

This being an action in equity for an accounting, no accounting properly could be rendered until the amount for which petitioners should be required to account was ascertainable, and this amount—petitioners' profit in the purchase of stock from plaintiff and interveners—can not be ascertained until the final determination of the proceedings now pending before the United States Board of Tax Appeals of the liability for said income and excess profits taxes.

The relief continually sought by petitioners, the stay of the accounting until such time as the income and excess profits tax claim finally had been determined, does not represent anything new or unusual in an accounting. It is analogous to an unliquidated claim being pleaded in

an accounting in equity, where the court will suspend the accounting to afford the defendant a proper opportunity to establish his claim at law.

As stated in *1 C. J.* Accounting, *section 133:*

> "The court of chancery cannot take cognizance of unliquidated claims for damages in an accounting, but will permit the parties to go into a court of law and establish their rights, and return to chancery to state the result in the account, the accounting being suspended in the interim."

The following cases being cited in support of the foregoing statement:

> *Knorr v. Lloyd, (N. J. Ch.) 47 A. 53;*
> *McCracken v. Harned, 59 N. J. Eq. 190, 44 A. 959;*
> *Alpaugh v. Wood, 45 N. J. Eq. 153, 16 A. 676;*
> *Trotter v. Heckscher, 40 N. J. Eq. 612, 4 A. 83.*
> See also *1 C. J. S.* Accounting, *Section 41 (d).*

Further, the relief sought by petitioners is entirely proper when it is considered that a supersedeas bond for $26,000 was posted for the appeal to the United States Circuit Court of Appeals (R. 112) and an additional bond of $5,000 was filed to obtain the stay of the mandate to permit petitioners to seek a review by certiorari in the Supreme Court (R. 189).

While the judgment as presently rendered reserves to petitioners the right to assert against respondents any claims they may have against them for tax refunds and

reimbursements (R. 95), petitioners have and will have no such claims independently of the judgment in this suit, and the reservation to them of the right to assert any such claims is meaningless.

We submit that it is in this proceeding, in taking the account between the parties, that the income and excess profit taxes should be taken in account.

It also with respect is submitted that this Court should exercise its supervisory jurisdiction because of the failure of the Court of Appeals to pass upon or consider in any way in its opinion the position and contentions of petitioners in respect to the income tax and excess profit tax assessment imposed upon them, which would affect the true value of the shares acquired from respondents, and as to which petitioners sought a stay of the accounting until such time as the tax liability finally had been determined.

Citing numerous decisions of this Court, the late Mr. Justice Butler, speaking for the Supreme Court, in *Baltimore & Ohio Railroad Company, et al., v. United States of America, et al., 298 U. S. 349, 80 L. Ed. 1209,* declared:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."
>
> *Constitution of the United States, Amendment 5.*

Believing in an action in equity for an accounting that no accounting properly can be rendered until the amount for which petitioners should be required to account is ascertainable and that the Circuit Court of Appeals has deprived petitioners of due process of law, in failing to pass upon and consider in its opinion their contentions in respect to the income and excess profits tax assessed by the United States Commissioner of Internal Revenue, all of which would relate to the true value of the Texota shares purchased and the ultimate liability of petitioners to respondents, petitioners earnestly submit that the United States Circuit Court of Appeals for the Fifth Circuit committed prejudicial error in respect to the matters hereinabove discussed, and that in view of the questions involved to the rights of your petitioners and the fair and clear administration of justice, this Court should issue its writ of review and decide these questions.

Respectfully submitted,

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